

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 JONATHAN J. POLLARD,
5 Petitioner,

6 v. 15 Civ. 9131 (KBF)

7 UNITED STATES PAROLE COMMISSION,
8 et al.,

9 Respondents. Argument

10 -----x
11 New York, N.Y.
12 December 14, 2015
13 2:00 p.m.

14 Before:

15 HON. KATHERINE B. FORREST

16 District Judge

17 APPEARANCES

18 CURTIS MALLET-PREVOST COLT & MOSLE LLP
19 Attorneys for Petitioner
20 BY: ELIOT LAUER
21 SYLVI SAREVA

22 PREET BHARARA
23 United States Attorney for the
24 Southern District of New York
25 Attorney for Respondents
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1 (Case called)

2 THE COURT: Good afternoon.

3 What I would like to do is start by giving you folks
4 the Court's predicted decision orally first. Then I would like
5 to have you address that decision very specifically in terms of
6 have I misunderstood the facts or the law or otherwise gotten
7 things wrong. I'm going to start with some background, and
8 then we'll take it from there and see whether Mr. Lauer wants
9 to begin or whether the government wants to begin in terms of
10 the Court's decision in terms of whether it changes the state
11 of play.

12 As we all know, the petitioner is here on a petition
13 under 2241, which is a habeas petition relating to changing the
14 conditions of his parole. He requests that certain terms of
15 his parole be vacated. He served 30 years of a life sentence
16 and has been recently paroled.

17 As we all know, parole is no longer available in the
18 federal system. It was in fact eliminated shortly after Mr.
19 Pollard was sentenced. After 1987, if one was convicted of a
20 crime and sentenced to life imprisonment, one would in fact
21 serve that.

22 The government has described the background of the
23 case very briefly as follows. While employed as a civilian
24 intelligence analyst for the U.S. Navy, Mr. Pollard delivered
25 classified documents to representatives of the government of

1 Israel. He would remove hardcopy documents from a government
2 building, place them in a suitcase, and hand the suitcase to an
3 Israeli handler. The documents would be copied and returned to
4 the government building. This occurred at various times
5 between 1984 and '85. Mr. Pollard pled guilty in June of 1986.
6 He was sentenced to life imprisonment on March 4, 1987.

7 Mr. Pollard challenges three conditions of his parole.
8 One is computer monitoring of both work and personal use. He
9 argues that it is not reasonably related to the offense of
10 conviction, not reasonably related to his history and
11 characteristics, not reasonably related to the goals of
12 sentencing, and conflicts with the goal of rehabilitation. He
13 also argues that it is not a condition needed for the
14 protection of the public welfare and that it is particularly
15 and unreasonably onerous. Petitioner notes that the Internet
16 did not exist at the time of his conviction.

17 The second condition is GPS monitoring. He asserts
18 the same concerns but, in addition, that the GPS monitoring
19 should be enforced by the least restrictive means of achieving
20 the government's interests. As imposed, he asserts that it is
21 both statutorily and constitutionally impermissible and that it
22 interferes with his religious observance: in particular, that
23 he would need to recharge the battery during the sabbath or
24 otherwise be in violation of his parole conditions. The Court
25 notes that the government has informed the Court that a new GPS

1 device is available that would have extended battery life, two
2 batteries, for a total of a 40-hour battery life.

3 The third condition of parole that Mr. Pollard
4 challenges is his 7:00 p.m. to 7:00 a.m. curfew. He argues
5 that it serves no purpose at all and, as imposed, interferes
6 with his religious observance, as it prevents him from
7 attending various religious services and events.

8 The Court notes that the parole commission's statement
9 of reasons as to each of the conditions it reviewed on its
10 appeal to the commission was a single page. That is Exhibit G
11 to the Lauer declaration.

12 I turn next to the statutory framework, which is 18
13 U.S.C. section 4206(d), which provides that the commission
14 shall not release a prisoner if it determines that he has
15 seriously or frequently violated institution rules and
16 relations and that there is a reasonable probability that he
17 will commit any federal, state, or local crime.

18 18 U.S.C. 4209 subpart (a) provides that the
19 commission may impose or modify other conditions of parole to
20 the extent that such conditions are reasonably related to the
21 nature and the circumstances of the offense and the history and
22 the characteristics of the parolee.

23 I want to make sure I didn't misstate when I was just
24 talking about 4206(d). It should say that the commission shall
25 not release a prisoner if it determines that he has seriously

1 or frequently violated institution rules and regulations and
2 that there is a reasonable probability that he will commit any
3 federal, state, or local crime. I wanted to make sure I had
4 all my "not"s and my "in"s in the right place.

5 Lastly, under 4209 there is an additional provision,
6 which is that the commission may impose or modify conditions of
7 parole and may provide for such supervision and other
8 limitations as are "reasonable to protect the public welfare."

9 As we all know and the parties have argued to the
10 Court, supervised release replaced parole for crimes as of
11 November 1, 1987. While the Supreme Court has stated that
12 parole is closely analogous to supervised release -- and that
13 is the Samson case, 547 U.S. 843, 854; the Johnson case 529
14 U.S. 694, 710-711 -- and while the court may modify the terms
15 of supervised release, the court does not modify the terms of
16 parole; that is for the parole commission to do. So that is a
17 difference between the two types of restrictions.

18 Parole conditions are also governed by 28 CFR section
19 2.40, which is promulgated by the DOJ, which governs the
20 imposition of conditions of release. Under subpart (b) as to
21 special conditions, it states, "They may be imposed if we
22 determine that imposing the condition is reasonably related to
23 the nature and the circumstances of your offense or your
24 history and characteristics and at least one of the purposes of
25 sentencing. In choosing a condition, we will also consider

1 whether the condition imposes no greater deprivation of liberty
2 than was reasonably necessary for purposes of deterrence of
3 criminal conduct, protection of the public from the crime, and
4 offender rehabilitation."

5 In terms of procedural history, let me turn to that
6 next. On August 26, 2015, even prior to the time the
7 petitioner was released on parole, he challenged certain
8 conditions. The government argues that he did not challenge
9 the imposition of the computer monitoring restriction on his
10 home computer. We'll talk about that.

11 On October 8, 2015, the parole commission's national
12 appeals board eliminated one computer access restriction but
13 otherwise affirmed the restrictions. I refer to "the
14 commission" to include both the parole board and the appeal
15 board. As to the GPS condition, the board found that the
16 restriction was reasonably related to his offense that involved
17 covert conduct and to the need to deter petitioner from further
18 crimes.

19 As to the computer monitoring condition, the
20 commission stated that, "As a practical matter, the boundaries
21 between personal and business computer use are blurred. This
22 condition will assist the U.S. probation office with ensuring
23 that you are complying with your ongoing obligation under the
24 plea agreement." The agreement prohibits further disclosure of
25 classified information and that if, for instance, Mr. Pollard

1 writes a book, he must submit it to the director of naval
2 intelligence for a prepublication review.

3 Implementation of the computer and GPS conditions was
4 left to the probation office. Mr. Pollard was released on
5 November 20, 2015. The probation office, in exercising their
6 duties and responsibilities delegated to them from the parole
7 board and parole commission, sua sponte imposed a 7 days a week
8 curfew of 7:00 to 7:00. In discussions between probation and
9 defense counsel, probation did indicate that the curfew was
10 standard.

11 The Court notes that the curfew and the GPS conditions
12 appeared to be to monitor certain exclusion zones which are not
13 challenged. Those are relating to Mr. Pollard's ability, which
14 is thereby prevented, from accessing the embassies of Israel,
15 South Africa, China, and Russia -- those are certain exclusion
16 zones -- as well as various airports in the metropolitan area.

17 The arguments are very high-level, of course. They
18 are set forth in detail in the papers that have been presented
19 by the petitioner:

20 That the parole commission failed to determine whether
21 there was "a reasonable probability that Mr. Pollard would
22 commit another serious crime," and that the position of the
23 government in connection with the grant of parole, along with
24 submissions of Robert McFarland, the U.S. national security
25 adviser at the time of Pollard's arrest, and former Senator

1 Dennis DeConcini, who served on the Senate intelligence
2 committee at the time of arrest and who later chaired the
3 committee that reviewed classified portions of Pollard's file,
4 both of those individuals affirmed that the classified
5 information to which Pollard had access would be of no use
6 today. Petitioner argues that the parole commission had to
7 make, effectively, a contrary finding and did not; that is a
8 legal question as to whether or not that was in fact required.

9 Petitioner also argues that in determining that parole
10 was warranted, the parole commission made the opposite finding,
11 that there was no such probability. As cast, the Court notes
12 that that argues too much. According to that standard, the
13 parole commission must always make the determination as to any
14 individual prior to granting of parole that there was no
15 reasonable probability of an additional crime. If the Court
16 were to accept the argument wholesale, then in all cases where
17 such a finding had been made for the grant of parole, special
18 conditions would conflict with this determination. No court
19 has gone that far.

20 Petitioner, finally, also argues that the probation
21 office has exacerbated conditions by imposing additional
22 restrictions, primarily curfew.

23 The government argues that parole was acting within
24 its discretion pursuant to the authority delegated to it, that
25 petitioner failed to exhaust his administrative remedies with

1 regard to the monitoring of his home computer, that the
2 conditions satisfy the deferential, rational basis standard of
3 review that applies to parole commission determinations, that
4 petitioner has failed to show that the GPS and curfew
5 conditions substantially burden his exercise of religion, and
6 that in terms of the computer monitoring condition, that is
7 justified according to the government based upon the more
8 limited Fourth Amendment rights due to a parolee.

9 Let's talk about the legal standard and the Court's
10 determination. Let me address ripeness first. The ripeness
11 point as to the home monitoring restriction is an important
12 argument but does not preclude review. The Court generally
13 cannot review a condition that was not appealed unless there
14 has been plain error. That means that the condition not raised
15 below has to have been error, that error has to have been
16 plain, and it has to have affected substantial rights. When
17 such conditions are met, the court may review the forfeited
18 error if the error "seriously affects the fairness, integrity,
19 or public reputation of the judicial proceedings."

20 Second, there are a number of other legal principles
21 that are in play here, and the standard of review is where I
22 will start. In reviewing the commission's parole
23 determinations, the Court's role here is to inquire whether
24 there is a rational basis in the record for the commission's
25 conclusions embodied in its statement of reasons. That is the

1 Iuteri v. Nardoza case, which is a Second Circuit 1984 case.
2 That case was a review of a parole decision, not a special
3 conditions decision, but the principle is applicable
4 nonetheless.

5 Further, in reviewing the parole commission's
6 determinations, the district court may not substitute its
7 judgment for that of the commission, and therefore the scope of
8 its review is very limited. That is the Zannino v. Arnold
9 decision, and there are a number of decisions that are similar
10 to it, Second Circuit 1976.

11 The Court according to that case and the various
12 principles that follow that case, which are quite clear, the
13 court is to look for what is a factual basis to support the
14 commission's determinations. The inquiry is not whether the
15 commission's determinations are based on a preponderance of the
16 evidence or even by substantial evidence. The inquiry is only
17 whether there is a rational basis in the evidence in the record
18 for the commission's conclusions embodied in its statements of
19 reasons.

20 That same case also stands for the proposition that if
21 there is adequate supporting information to show a rational
22 basis, that's the end of the court's inquiry. It also states,
23 "It would have been and would be within the sound discretion of
24 a district court to remand to the parole board to make a fuller
25 showing of the factual bases underlying the statement of

1 reasons." As you folks will soon hear, that is what this Court
2 intends to do and believes is appropriate here.

3 Another principle relevant to this petition as set
4 forth in the Birzon case, which is a Second Circuit 1972 case,
5 is that "the government can infringe on First Amendment rights
6 of prisoners so long as the restrictions reasonably and
7 necessarily related to the advancement of some justifiable
8 purpose of imprisonment; and, when a convict is conditionally
9 released on parole, the government retains substantial interest
10 in ensuring that its rehabilitative goal is not frustrated and
11 that the public is protected from further criminal acts by the
12 parolee."

13 The Morrissey case provides additional important
14 principles which state in sum that the liberty of a parolee
15 enables him to do a wide range of things open to persons who
16 have never been convicted of any crime, though the state
17 properly subjects him to many restrictions not applicable to
18 other citizens. His condition is very different from that of
19 confinement in a prison. That's the Morrissey v. Brewer case,
20 U.S. Supreme Court 1972.

21 It also states that "The liberty of a parolee includes
22 many of the core values of unqualified liberty and also that
23 the state has found the parolee nonetheless guilty of a crime
24 against the people, and that that finding justifies imposing
25 extensive restrictions on the individual's liberty.

1 A sentencing court therefore, according to the Second
2 Circuit in other cases, may order a special condition that is
3 reasonably related to the statutory sentencing factors.
4 Although the discretion is broad, the Second Circuit has stated
5 that it will carefully scrutinize unusual or severe conditions.
6 That is the Sofsky case, Second Circuit 2002. That related to
7 monitoring of a computer in that case.

8 Here, turning to my discussion, the record of the
9 parole commission's reasons I believe is insufficient to
10 support the nature and the breath of the restrictions. The
11 Court will not second-guess those restrictions unless and until
12 the commission has had an opportunity itself to more fully set
13 forth its rationale. It may be that each of the restrictions
14 is appropriate as imposed; the commission will have the
15 opportunity to demonstrate that.

16 At base, there is a fundamental issue, however, which
17 the Court believes informs its review and further appellate
18 review of the severity of the restrictions, and that is the
19 question as to whether there is anything that Mr. Pollard can
20 disclose that would endanger the public, is there any
21 confidential government information left to disclose. If the
22 answer is yes, then obviously broad restrictions may be
23 justified. If the answer is no, then the broad restrictions
24 take on a different appearance and must serve other sentencing
25 requirements.

The parole commission's decision does not address this question directly. Indeed, its statement of reasons, as I said, is only one page and is quite cursory.

As we are at the outset of what will be, and the "we" here is the government and the court system, a lengthy monitoring process over the remainder of Mr. Pollard's life unless his parole conditions are eliminated, the parole commission should grapple with this question and then include a finding as to the resolution of this question in its statement of reasons for the conditions imposed. That is not something which necessarily is required to support the restrictions, but it certainly would go a long way to supporting the restrictions. It should in general develop its statement of reasons.

Even if the commission's decision is that there is no information that remains secret that Mr. Pollard knows, the Court cautions that that does not eliminate the basis for the imposition of certain special conditions, including those here, though they may or may not maintain all of the breadth which they currently have.

For instance, an easy one, I think, relates to Mr. Pollard's agreement in his plea agreement to have a prepublication review of his book if he ever writes a book. I think that is a TBD. I don't know that there is a book in the offing, but that condition would remain.

1 Similarly, the very fact that Mr. Pollard committed
2 such an egregious crime against the state itself demonstrates a
3 level of criminality at a much earlier point in time, which may
4 justify a certain amount of ongoing monitoring, but it has to
5 be, I think, brought forward to justify and support the very
6 severe broad restrictions here.

7 Let me talk very briefly about the challenged
8 restrictions. As to the home monitoring, there was no
9 challenge raised below. The petitioner must exhaust his
10 administrative remedies and will have a further opportunity to
11 do so in light of this remand. However, I would note that the
12 commission itself has noted the merger between home and
13 business computer use and that therefore this term is very
14 likely to follow whatever is the ultimate decision on the
15 business monitoring of the computer.

16 Pollard argues that the monitoring of a work computer
17 is unjustified and overly restrictive, as I have already said.
18 The Court finds that the parole commission has not sufficiently
19 justified this condition to allow for the full review it needs
20 to do under the appropriate standard. As I said, it's a very
21 cursory statement with regard to that statement to that
22 condition.

23 Petitioner argues that his use of a computer with work
24 at a financial services company will chill the desire for
25 employers to want to use him at all or as fully as they

1 otherwise might. The government says that that is unproven at
2 this point. The Court can't think of a job that anybody can do
3 these days without a computer and without access to the
4 Internet, and certainly in a financial services company. Maybe
5 there is something; it's not one that I am aware of.

6 However, it is not the case that a parolee is
7 necessarily entitled to the job of his choice if the special
8 conditions are otherwise fully justified. There is no basis in
9 the record as it currently stands to support this broad
10 condition. This book that we talked about is really something
11 that can be dealt with in a totally different way, in a much
12 more less intrusive manner. So, the parole commission needs to
13 look at this.

14 The Court does note that Mr. Pollard never used the
15 Internet, in fact it didn't exist, and I agree with that point.

16 If there is secret information which Mr. Pollard can
17 still disclose, then there is certainly possible extensive
18 monitoring that might be appropriate. This might be so even
19 though such a condition could interfere with petitioner's
20 efforts to be appealing to certain employers or to do certain
21 kinds of work. But that would be part of the balancing test
22 that would have to go on.

23 In terms of GPS monitoring, it is certainly true that
24 parolees have only conditional liberty. That is the Thomas
25 case, Second Circuit 1984; the Grimes case, Second Circuit

1 2000. And intrusions into a parolee's privacy must be pursuant
2 to a rule and regulation that itself satisfies the Fourth
3 Amendment. That is the Barner case. There is similarly
4 insufficient factual basis for this condition, and the factual
5 record should be developed for the GPS monitoring.

6 The monitoring condition appears to be directed at
7 maintaining compliance with the exclusion zones to ensure that
8 the defendant does not go to the Israeli embassy or try to flee
9 the country. This may well be justified to the extent that
10 there is a real concern that the petitioner carries in his head
11 information that would be of use to a foreign government. Of
12 course, it would seem that if the issue is simply dissemination
13 of additional secret information, that could be accomplished in
14 one's kitchen or office in a meeting at home without the need
15 for flight.

16 If the information Mr. Pollard has is no longer
17 confidential, then the breadth of these conditions may need and
18 do need some additional justification. In the absence of a
19 factual determination as to some danger based on what Mr.
20 Pollard still knows, if anything, that would be of current use
21 to a foreign government, it is unclear what the GPS monitoring
22 is intended to do. The Court understands that petitioner's
23 crime involved covert means, as the commission stated. But
24 that is as to a past fact, and it is unclear how that relates
25 to protection of the public welfare or any other sentencing

1 factor currently. The curfew, in my view, appears to really
2 follow what happens with GPS.

3 In terms of the Religious Freedom Restoration Act,
4 which goes by the acronym RFRA, that provides that the
5 government may substantially burden a person's exercise of
6 religion only if it demonstrates that application of the burden
7 to the person is in furtherance of a compelling government
8 interest and is the least restrictive means of doing so. The
9 RFRA requires strict scrutiny of otherwise valid laws of
10 general application where the incidental burden on religion is
11 substantial.

12 I believe that this claim is properly reviewed after
13 the additional factual record as I discussed above is made.
14 Until that time, I can't properly address the extent of the
15 compelling interest by the government. I need to understand
16 the government interest, what it is, to be able to make that
17 weighing analysis. The Court may also need a further
18 evidentiary record, it is unclear, on the extent to which there
19 is a true burden on the exercise of petitioner's religion based
20 upon the condition.

21 The Court declines to vacate the conditions of parole
22 given the crime's serious nature and the impact potentially on
23 national security. The Court is not going to second-guess the
24 determinations of the parole commission or of probation until
25 they have an opportunity to address the record themselves.

1 Based on the above, it is the Court's current
2 intention, subject to the argument that I hear from parties
3 right now, to remand this matter to the commission for further
4 development of the factual basis for its statement of reasons
5 for the challenged conditions. I would note that the
6 commission should pay particular attention to 28 CFR section
7 2.40 and the language therein when doing so.

8 I know that that was lengthy, but that gives you a
9 sense as to where I am. Certainly, Mr. Lauer, if I've gotten
10 it wrong, you should let me know. If you agree that that is
11 the right disposition and my bases are appropriate, there is no
12 reason to have to take a lot of time if we don't need to.

13 MR. LAUER: Your Honor, I think you got it right.
14 Obviously, in light of your Honor's decision, we will abide the
15 event of the commission coming back in the event they are able
16 to meet the standards and develop additional information.
17 There are a couple of minor points that I would like to put on
18 the record so that there is no confusion.

19 The Court made reference early on to the fact that the
20 U.S. Attorney's office or the parole commission had come up
21 with a new device with a 40-hour battery. As set forth in the
22 declaration of Rabbi Pesach Lerner, the battery change is no
23 different than putting a plug into a socket.

24 According to Rabbi Lerner's declaration -- and this is
25 well-established, you can basically Google this -- observant

1 Jews do not do anything on the sabbath, which is a 25-hour
2 period, not a 24-hour period, do nothing on the sabbath that
3 creates an electrical current. Therefore, changing a battery
4 in a battery operated device is an equal desecration of the
5 sabbath as is putting a plug into a socket.

6 Observing this tenet is a fundamental tenet of
7 Judaism. It's several thousand years old and it is a core
8 belief. It is a core part of the religious faith. So, the
9 battery change offers absolutely no assistance in enabling Mr.
10 Pollard to observe the tenets of his faith.

11 THE COURT: Let me ask you, Mr. Lauer, so that we can
12 have the framework for how I think about this clearly in mind
13 and understand where you differ from that framework. The Court
14 believes that if there was a sufficiently compelling govern-
15 mental interest, that even a burden on religious observance
16 would be tolerated, but there has to be a balancing, and the
17 balancing needs to be quite carefully done. Before I think one
18 can get into the nuances of the extent to which a particular
19 requirement burdens religion and may or may not violate the
20 RFRA, the Court needs to have first the factual table set, if
21 you will.

22 MR. LAUER: I appreciate that.

23 THE COURT: Do you agree?

24 MR. LAUER: I do agree. I agree that the issue is
25 ultimately to be decided after the commission comes back, if

1 they are able to come back, to show a compelling government
2 interest. I just didn't want there to be a misunderstanding in
3 terms of whether that device alleviates the problem.

4 I would like to make perhaps one application, and that
5 is with respect to the Internet. That really is a much more
6 time-sensitive issue. Mr. Pollard as a practical matter cannot
7 work in the financial services industry without the Internet
8 and without resolving this issue. As the Court recognizes,
9 there is no restriction on Mr. Pollard's communicating face to
10 face with people in his kitchen or in Starbucks. He has been
11 out for three weeks. He has met with a number of people.
12 There is no monitoring.

13 THE COURT: Let me tell you that until the commission
14 weighs in, there is no way I would touch the restriction,
15 because if I were wrong, I'm treading in an area that could be
16 quite serious. I want to give the commission the opportunity.
17 It has the expertise and it has the ability to make a fact-
18 finding that is necessary. I want to let them do it.

19 Are there some procedures were you can do this in an
20 expedited fashion, you can take this up with the commission in
21 an expedited fashion?

22 MR. LAUER: I would hope that they could do that. I
23 would make one final statement for the record. This deals with
24 the issue of whether or not Mr. Pollard has any useful
25 information. The declarations of Senator DeConcini and

1 national security adviser McFarland were both presented in the
2 parole process and again in this proceeding. They have never
3 been challenged, they have never been disputed.

4 Nowhere in the parole hearing process did the
5 government or anyone else, including members of the defense
6 agencies that participated, no one ever suggested that Mr.
7 Pollard in fact had usable information that he has retained in
8 his head that might be of interest to anyone.

9 THE COURT: I understand the point. I think what
10 needs to happen, in the Court's view, is for the matter to go
11 to the commission. They can develop what additional factual
12 record they deem useful or appropriate. If they do not
13 disagree that there is no remaining secret information in Mr.
14 Pollard's head that they are aware of or have reason to believe
15 exists, that I think places this matter in one particular
16 posture. If they do believe that there is something, the Court
17 would certainly not second-guess that. This Court would not
18 second-guess that if that is their factual determination.

19 MR. LAUER: I'll rest at this point, your Honor, and
20 wait for the commission. Thank you.

21 THE COURT: Let me hear from the government. Mr.
22 Jones, Ms. Tinio?

23 MS. TINIO: Good afternoon, your Honor. Your Honor,
24 it is probably fair to say that the respondents may not agree
25 in full with the Court's reasoning this afternoon. However, we

1 do agree with the Court that the proper remedy, since the Court
2 has viewed the U.S. parole commission's determinations with
3 skepticism, the proper remedy is remand to the U.S. parole
4 commission, and we appreciate that that is the avenue that the
5 Court has taken.

6 With respect to the concern about timing, the U.S.
7 Attorney's office doesn't control the U.S. parole commission's
8 timing. But in my experience so far, the client has been
9 responsive, and we hope that that will continue.

10 THE COURT: Let me have you pause for a moment. I
11 want to make sure that my comments before are taken in the
12 right light. If the statement of reasons is further made
13 fuller and if the Court, if I, were to read a fuller statement
14 of reasons and to read the restrictions against that backdrop,
15 I may not have any skepticism. It is only against the backdrop
16 of a one-page high-level cursory statement.

17 If there is no further statement of reasons to be had,
18 then I think I do have concerns. But I want to be clear that
19 it is not as if I've evaluated these factually against what I
20 believe is the full record.

21 MS. TINIO: That was how I understood the Court's
22 instructions. I appreciate the clarification, and the
23 respondents appreciate it as well, your Honor. I obviously
24 don't want to take up too much time unnecessarily. I will make
25 a few comments on the record.

8 THE COURT: That is correct. To the extent that the
9 normal process allows for give-and-take between the petitioner
10 here, Mr. Pollard, and the probation office to try to reach
11 accommodations on certain things in the interim, I would hope
12 that that would continue to occur.

I understand that there have been references where probation has indicated it is fully willing to have conversations about the sabbath and other observances. To the extent that there can be a working relationship that allows that to happen in the interim, I would fully expect that things would continue to be done in that fashion.

19 MS. TINIO: In that vein, your Honor, I appreciate
20 that invitation and that admonition. In that same vein I would
21 like to convey what we have put in our briefing, which is that
22 probation has repeatedly expressed, not only to me but I
23 believe also on the record, to the petitioner that they are
24 always willing to hear from him and to work with him on his
25 conditions.

1 They have told me over and over that their goal is to
2 implement what they have been told to do by the parole
3 commission but also do so in the least restrictive means
4 possible. Your Honor can see that from the probation office's
5 continuing efforts to find a GPS monitoring solution that might
6 be the least burdensome to Mr. Pollard. Their options are
7 limited. They are limited to the technology that is available
8 to them. But I think we have shown that they are continuing to
9 try.

10 Actually, just this morning, there is a slightly new
11 development, and I apologize, that sort of changes the factual
12 landscape here a little bit. We have actually been pushing and
13 pushing to try and understand what GPS technology is available
14 and what the capacities and capabilities are of the technology
15 that we already do have available.

16 A conversation between the probation office and the
17 monitoring contractor this morning actually suggested strongly
18 to probation that the device that Mr. Pollard is currently
19 using has a much greater charge capacity when he is at home
20 near the base station. The contractor told probation this
21 morning that it could actually charge for up to 80 hours when
22 he is at home. If he were to leave --

23 THE COURT: When you say charge, you mean how long the
24 charge would last or how long it would be on the charger?

25 MS. TINIO: The charge would last without need to plug

1 in the charger. The contractor also told probation this
2 morning that if Mr. Pollard were away from his home
3 continuously, the charge could last for about 24 hours. So
4 some mix of at home and away would reasonably suggest that the
5 charge would last somewhere between 24 and 80 hours.

6 Of course, this is just new information. We want to
7 provide it to the Court and to the petitioner to see how the
8 GPS monitoring is going. But the overall moral of the story
9 here is that probation would like to continue working with Mr.
10 Pollard and communicating with Mr. Pollard about his
11 conditions.

12 Mr. Lauer mentioned that Mr. Pollard was restricted
13 from using the Internet. That is not the case. That is
14 actually the specific condition that the national appeals board
15 overturned when Mr. Pollard appealed. Mr. Pollard is not
16 prevented from using the Internet.

17 THE COURT: He is not prevented from using the
18 Internet. As I understand it, his use of the Internet at home
19 currently is constantly monitored. If he took on an employment
20 position, similarly it would be subject to some form of
21 constant monitoring.

22 MS. TINIO: My understanding is that Mr. Pollard
23 actually does not have a home computer yet, so there is no home
24 monitoring, because he has no personal device at home. I would
25 mention, too, that not only did we advance an exhaustion

1 argument as to the home computer, but Mr. Pollard actually, in
2 his reply brief on page 4, abandoned any challenge to the home
3 monitoring. He may take a different position when he goes back
4 to the parole commission.

5 THE COURT: You are talking about page 4 of his
6 underlying brief to the appeals board, and also here?

7 MS. TINIO: No. Page 4 of his reply brief to this
8 Court that was filed Sunday.

9 THE COURT: Yes, all right.

10 MS. TINIO: Our argument as to the work monitoring
11 condition was that he had not proved that that was actually an
12 impediment. He has said in his papers that he has an offer of
13 employment. In the reply brief that he filed on Sunday there
14 was a footnote to the effect that his counsel has essentially
15 talked to his perspective employer and advised him not to be in
16 employment until after this dispute is resolved. So it is very
17 unclear as to what the actual situation is with the prospective
18 employer.

19 Our point is simply he at no point produced a
20 declaration or any evidence that any employer at all had
21 actually objected to him based on the computer monitoring
22 requirement. That is mostly just to clarify the record.
23 Because we are going back to the parole commission, it is sort
24 of moot for the moment.

25 The last thing I will say, your Honor, is your Honor

1 evinced a very strong concern about the perhaps continuing
2 classified nature or perhaps continuing harm that might be
3 posed by the dissemination of any information that Mr. Pollard
4 obtained when he was a naval intelligence officer. I
5 definitely would admit that this is not in our submissions.
6 It's sort of been a process of continuing to understand the
7 elements here.

8 But My understanding from consulting with the national
9 security division is that the majority of the information that
10 Mr. Pollard had and passed along 30 years ago, your Honor,
11 remains classified. As such, under executive order 13526, that
12 information is classified as top secret. The executive order
13 says that the unauthorized disclosure of that information
14 reasonably could be expected to cause exceptionally grave
15 damage to the national security, and any information that was
16 classified as secret as defined by the executive order as the
17 unauthorized disclosure of what could reasonably be expected to
18 cause serious damage to the national security.

19 If your Honor would find it helpful for the government
20 to put in a declaration as to the classified nature of Mr.
21 Pollard's information and citing the executive order, we could
22 certainly do that if that would be of any use.

23 THE COURT: I think it is really up to the commission
24 to have that information before it. If the commission reviews
25 that information in terms of the underlying facts -- when I say

1 that, I mean what you are basing your statement on, whether
2 it's a letter from the national security division, however the
3 information is conveyed -- that I think is the place to start.

4 I see myself as really a court that is to look at what
5 the commission has written down as its statement of reasons. I
6 don't think I would necessarily, I don't think I could
7 necessarily, second-guess its factual finding. It's whether or
8 not there is a factual basis in the record. That is for the
9 commission to look at.

10 MS. TINIO: That is a fair point, your Honor. With
11 that, I will also rest.

12 THE COURT: Thank you. Mr. Lauer.

13 MR. LAUER: Your Honor, one clarifying point so there
14 is nothing misunderstood. Based on our litigation under FOIA
15 and directly in the District of Columbia court, no member of
16 the parole commission has security clearance.

17 THE COURT: They will understand, I think, what their
18 task is. If they can do only some but not all of their task
19 and it needs to be presented in some other manner, sufficient
20 unto the day, as I say, step by step.

21 MR. LAUER: Correct.

22 THE COURT: I think this is the first step. I think
23 it is the right step. It sounds like I'm not hearing any
24 objection to this. Am I right about that?

25 MR. LAUER: None from us, your Honor.

1 MS. TINIO: No, your Honor.

2 THE COURT: The Court will issue a very short order
3 that will remand this matter to the parole commission for
4 further findings consistent with the Court's decision as set
5 forth now on the transcript. Hopefully, some of you are
6 ordering the transcript so that the parole commission will be
7 able to have access to that.

8 This matter is adjourned unless there is anything
9 further that we ought to take up today. Anything further?

10 MR. LAUER: Not from us, your Honor.

11 MS. TINIO: No, your Honor.

12 THE COURT: Thank you. We are adjourned.

13 (Adjourned)

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